Keith Orsi et al., Respondents, v Susan Haralabatos et al., Appellants, et al., Defendants. (Index No. 25565/06)

2010-09399

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

89 A.D.3d 997*; *934 N.Y.S.2d 195*; *2011 N.Y. App. Div. LEXIS 8396*; *2011 NY Slip Op 8570

November 22, 2011, Decided

SUBSEQUENT HISTORY: Leave to appeal granted by *Orsi v. Haralabatos, 2012 N.Y. LEXIS 531 (N.Y., Mar. 27, 2012)*

HEADNOTES

Physicians and Surgeons--Malpractice--Postoperative Care

COUNSEL: [***1] Phillips Lytle LLP, New York, N.Y. (Eric M. Kraus and Craig R. Bucki of counsel), for appellants.

Silberstein, Awad & Miklos, P.C., Garden City, N.Y. (Joseph C. Muzio and Dana E. Heitz of counsel), for respondents.

JUDGES: William F. Mastro, J.P., Mark C. Dillon, Sandra L. Sgroi, Robert J. Miller, JJ. Mastro, J.P., Dillon, Sgroi and Miller, JJ., concur.

OPINION

[*997] [**195] In an action to recover damages for medical malpractice, etc., the defendants Susan Haralabatos and Stony Brook Orthopaedic Associates appeal from so much of an order of the Supreme [*998] Court, Suffolk County (Sweeney, J.), dated July 20, 2010, as denied their motion for summary judgment [**196] dismissing the complaint insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the motion of the defendants Susan Haralabatos and Stony Brook Orthopaedic Associates for summary judgment dismissing the complaint insofar as asserted against them is granted.

"'The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury'" (*Barnett v Fashakin, 85 AD3d 832, 834, 925 NYS2d 168 [2011]*, quoting *DiMitri v Monsouri, 302 AD2d 420, 421, 754 NYS2d 674 [2003]*; [***2] *see Guzzi v Gewirtz, 82 AD3d 838, 918 NYS2d 552 [2011]*). Thus, on a motion for summary judgment dismissing the complaint in a medical malpractice action, the defendant health care provider has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Wexelbaum v Jean, 80 AD3d 756, 757, 915 NYS2d 161 [2011]*; *Rebozo v Wilen, 41 AD3d 457, 458, 838 NYS2d 121 [2007]*). "[T]o defeat summary judgment, the nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Stukas v Streiter,*

83 AD3d 18, 24, 918 NYS2d 176 [2011]).

In support of their motion for summary judgment dismissing the complaint insofar as asserted against them, the defendants Susan Haralabatos and her employer, Stony Brook Orthopaedic Associates (hereinafter together the defendants), submitted affirmations from expert physicians that were sufficient to establish, prima facie, that the post-operative care received by the injured plaintiff following repair of a bone fracture did not depart from good and accepted standards of medical practice, and that, in any event, any alleged departures [***3] did not proximately cause the injured plaintiff's injury (*see Lowhar v Eva Stern 500, LLC, 70 AD3d 654, 655, 894 NYS2d 490 [2010]*; *Wiands v Albany Med. Ctr., 29 AD3d 982, 983, 816 NYS2d 162 [2006]).* Therefore, the defendants met their burden of establishing their prima facie entitlement to judgment as a matter of law.

While the plaintiffs, in opposition, submitted an affirmation from an expert physician that raised triable issues of fact as to whether Dr. Haralabatos may have departed from good and accepted practice, they failed to raise a triable issue of fact as to whether the alleged departures proximately caused the injured plaintiff's condition (*see Wilkins v Khoury, 72 AD3d 1067, 1068, 900 NYS2d 347 [2010]*; *see generally Fahey v A.O. Smith Corp., 77 AD3d 612, 616, 908 NYS2d 719 [2010]).*

[*999] Accordingly, the defendants' motion for summary judgment dismissing the complaint insofar as asserted against them should have been granted. Mastro, J.P., Dillon, Sgroi and Miller, JJ., concur.

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